Supreme Court, U.S.
FILED

961028 DEC 23 1996

OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KEVIN A. WHITECLIFF,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN R. ROSEN
440 Louisiana, Suite 2100
Houston TX 77002
Phone (713) 227-2900
Fax (713) 227-2922
SBN 17266200
Attorney for Petitioner

Alpha Law Brief Company • Houston, Texas • (713)981-9000 • (800)981-9001

RECEIVED
DEC 27 1996
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

(1) Whether the standard of review on the quantum of evidence sufficient to warrant the submission of a defensive issue in the jury charge in a multi-defendant criminal case focuses on the individual defendant; or, conversely, on the knowledge and experiences of all the participants?

(2) Whether the enhanced-punishment provision of 18 U.S.C. §924(c)(1), *i.e.*, thirty (30) years for carrying a machinegun, is an element of the offense and a jury question which should be submitted in the charge; or a sentencing issue left to the discretion of the trial court?

(3) Whether 18 U.S.C. §924(c)(1), using or carrying a firearm during a crime of violence, requires a conviction for the crime of violence? And, conversely, whether an acquittal of the predicate crime of violence, by the same jury, precludes a conviction under §924(c)(1)?

PARTIES TO THE PROCEEDING

The parties in the proceeding in the Court of Appeals were the United States and the following individuals: Brad Eugene Branch, Kevin A. Whitecliff, Jaime Castillo, Renos Lenny Avraam, Paul Gordon Fatta, and Graeme Leonard Craddock. There are no parent companies or nonwholly owned subsidiaries to be listed.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

(a) Proceedings in the Courts 2

(b) Statement of Facts 4

ARGUMENTS AMPLIFYING THE REASONS FOR REVIEW 9

I.
The Fifth Circuit has misapplied *Mathews v. United States*, 485 U.S. 58 (1988), in its holding that the trial court did not err in refusing an instruction on self-defense in that the Fifth Circuit has altered the standard of review to disallow consideration of the evidence relevant to an individual defendant in favor of a consideration of only evidence relevant to all the participants collectively and to increase the burden of proof upon the defendant/movant to a point beyond that mandated by *Mathews v. United States* . . . 9

II.
The Fifth Circuit's misinterpretation of 18 U.S.C. §924(c)(1) as merely a sentencing provision, and its rejection of a jury finding on the issue of whether the firearm used was a machinegun, conflict with opinions from the First, Sixth and Ninth Circuits 12

III.
The Fifth Circuit has misconstrued 18 U.S.C. §924(c)(1) to eliminate any requirement of a conviction precedent to the assessment of its enhanced-punishment provision, in clear abrogation of the plain words and meaning of the statute 21

CONCLUSION 25

APPENDICES

Opinion of the U.S. Court of Appeals for the Fifth Circuit, dated August 2, 1996, is reproduced in the Appendix of the joint petition for writ of certiorari filed on behalf of the co-appellants, Brad Eugene Branch, Graeme Leonard Craddock, and Renos Lenny Avraam.

Appendix A
Order of the U.S. Court of Appeals for the Fifth Circuit denying the petition for rehearing and suggestion for rehearing en banc, dated September 25, 1996 . . . . . 1a

Appendix B
Amended judgment of the U.S. District Court, filed June 23, 1994 . . . . . 3a

TABLE OF AUTHORITIES

CASES: **PAGE**

Carella v. California, 491 U.S. 263 (1989) 20

Deal v. United States, 113 S.Ct. 1993 (1993) 14

Mathews v. United States, 485 U.S. 58 (1988) . . . 9, 12

McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) 18-20

Moskal v. United States, 111 S.Ct. 461 (1990) 24

United States v. Alerta, 96 F.3d 1230 (9th Cir. 1996) 13, 16, 19, 20

United States v. Bass, 92 S.Ct. 515 (1971) 24

United States v. Branch et al., 91 F.3d 699 (5th Cir. 1996) . . . . . passim

United States v. Correa-Ventura, 6 F.3d 1070 (5th Cir. 1993) 10, 17, 18

United States v. Jones, 839 F.2d 1041 (5th Cir. 1988) 10

United States v. Lucien, 61 F.3d 366 (5th Cir. 1995) 10

United States v. Martinez, 7 F.3d 146 (9th Cir. 1993) 13, 16, 19

United States v. Melvin, 27 F.3d 710 (1st Cir. 1994) 13, 16, 17

United States v. Munoz-Fabela, 896 F.2d 908 (5th Cir.) 23

United States v. Powell, 469 U.S. 57 (1984) 23

United States v. Ruiz, 986 F.2d 905 (5th Cir.) 23

United States v. Sims, 975 F.2d 1225 (6th Cir. 1992) 13, 15, 16, 18

United States v. Stovall, 953 F.2d 188 (5th Cir. 1992) 10

CONSTITUTIONS, CODES, STATUTES, AND RULES:

18 U.S.C. § 2 2

18 U.S.C. § 924(c)(1) . . . . . passim

18 U.S.C. §1111(a) 2

18 U.S.C. §1114 2

18 U.S.C. §1117 2

18 U.S.C. §3742 4

28 U.S.C. §1254(l) 1

28 U.S.C. §1291 4

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has been published, *United States v. Branch et al.*, 91 F.3d 699 (5th Cir. 1996). It has been replicated in the Appendix attached to the joint petition for writ of certiorari filed on behalf of the co-appellants, Brad Eugene Branch, Graeme Leonard Craddock, and Renos Lenny Avraam. The September 25, 1996, order of the Fifth Circuit denying petitioner's petitions for rehearing and suggestion for rehearing *en banc* is also published, *United States v. Branch et al.*, 91 F.3d at 752. It is reproduced in the Appendix at A.

JURISDICTION

On August 2, 1996, the Court of Appeals for the Fifth Circuit affirmed the convictions on Counts 2 and 3, vacated the sentence in Count 3, and remanded Count 3 to the United States District Court for the Western District of Texas, Waco Division, for findings and resentencing. On September 25, 1996, the Court of Appeals denied petitioner's petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(l).

STATUTORY PROVISIONS

18 U.S.C. §924(c)(1) provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced-punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States,

uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below:

On August 6, 1993, a superseding indictment was returned which alleged that petitioner, Kevin A. Whitecliff: Count 1 - conspired to murder federal agents in violation of 18 U.S.C. §1117; Count 2 - aided and abetted the murder of federal agents in violation of 18 U.S.C. §§2, 1111(a), and 1114; and Count 3 - used or carried a firearm during the

offense alleged in Count 1, *i.e.*, conspiring to murder federal agents, in violation of 18 U.S.C. §924(c)(1). (11 R. at 312-20).[1]

To these counts of the indictment, Whitecliff entered a plea of not guilty before a jury. (11 R. at 325-26). The jury trial, encompassing appellant and ten (10) co-defendants, began on January 10, 1994. (1 Tr. at 14). The government rested on February 15. (26 Tr. at 6442). On February 17, the defense rested. (28 Tr. at 6872-73). The court charged the jury on Counts 1, 2, and 3. (15 R. at 1203-16, 1217-23, 1233-34). However, the court also charged the jury under Count 2 on self-defense and defense of another on the aiding and abetting murder allegation, (15 R. at 1224-29); and on the lesser included offense of aiding and abetting voluntary manslaughter, (15 R. at 1230-32); but refused appellant's request to charge the jury on the issue of self-defense and defense of another on the lesser included offense of aiding and abetting voluntary manslaughter. (29 Tr. at 7017).

On February 26, the jury returned verdicts of "not guilty" on Count 1 and the murder conspiracy allegation in Count 2, and verdicts of "guilty" on Count 3 and on the lesser included offense of aiding and abetting voluntary manslaughter. (15 R. at 1275-78; 32 Tr. at 7403-06).

By the judgment and sentence entered on June 21, and amended on June 23, 1994, Whitecliff was sentenced to consecutive terms of imprisonment for ten (10) years for aiding and abetting voluntary manslaughter and for thirty (30) years for using or carrying a firearm during the conspiracy to murder federal agents alleged in Count 1.

---

[1]Petitioner will use the following abbreviations for references to volumes and page(s) of the appellate record: the record on appeal, "--R. at --"; and the transcript, "--Tr. at --".

Further, Whitecliff was assessed a $2,000.00 fine and restitution in the aggregate amount of $1,131,687.49. (17 R. at 1599-1604; App. B). By order dated June 20, restitution was limited to proceeds received by Whitecliff from any book or film contracts concerning the crimes for which he was convicted. (17 R. at 1572-73). Whitecliff filed a timely notice of appeal on June 24. (17 R. at 1605). The Fifth Circuit Court of Appeals acquired jurisdiction pursuant to 18 U.S.C. §3742 and 28 U.S.C. §1291.

On August 2, 1996, a 2-1 divided panel of the United States Court of Appeals for the Fifth Circuit issued majority and dissenting opinions and rendered a judgment affirming the convictions under Counts 2 and 3, vacating the sentence on Count 3, and remanding this cause to the trial court for findings and resentencing on Count 3. *United States v. Branch et al.*, 91 F.3d at 699-752.

On September 25, 1996, the Court of Appeals issued an order denying petitioner's petition for rehearing and suggestion for rehearing *en banc*. *United States v. Branch et al.*, 91 F.3d at 752.

This petition for writ of certiorari has been filed with the Clerk of the Court within ninety (90) days of the denial of rehearing in the Fifth Circuit, pursuant to Rule 13.3.

(ii) Statement of Facts:

This case arises out of the February 28, 1993, raid by 75 agents of the Bureau of Alcohol, Tobacco and Firearms (hereinafter ATF) upon the Mount Carmel Center of a religious sect, the name of which has come to be associated with this case: the Branch Davidians. This sect encompassed a multiethnic, multinational group of some 115 men, women

and children, whose ages ranged from toddlers to the geriatric. Their rural retreat and residence, located northeast of Waco, comprised principally of a rather large two-story building. The 65-year-old sect, originally affiliated with the Seventh Day Adventist Church, was committed to a life of Bible study, with an emphasis on the end of the world and the establishment of God's kingdom on earth. (16 Tr. at 4215). The group's leader, David Koresh, taught that, in the end, God's minions would be assaulted and persecuted by the forces of evil; and that, as a result, it was God's directive to arm themselves in order to defend themselves against the final attack. (16 Tr. at 4215).

During an almost year-long investigation prior to February 28, 1993, ATF agents developed information that David Koresh and his followers were amassing a stockpile of hundreds of weapons, including fully automated weapons and hand grenades, at their Mount Carmel center. ATF obtained warrants for the arrest of Koresh and for the search of the center. (6 Tr. at 1274; Government Exhibit Nos. 1906 and 2050). ATF agents planned a raid to execute these warrants on February 28.

Because of an article in a local newspaper and an inadvertent meeting with a television camera man, Koresh was forewarned of the impending raid. An undercover ATF agent, Rodriguez, who had been inside the center, advised ATF that, 45 minutes before the planned raid, Koresh and his followers were aware of the raid. However, ATF decided to carry out the raid as planned. (6 Tr. at 1274-1519; 7 Tr. at 1520-1824; 8 Tr. at 1825-2122; 9 Tr. at 2123-2297; 10 Tr. at 2298-2628; 11 Tr. at 2629-2921; 12 Tr. at 2922-3043, 3103-60).

The raid involved a frontal assault by ATF agents transported in two cattle trailers and a helicopter raid at the rear of the center. The frontal assault team was assigned a dual attack upon the front door and upon the window of the room ATF believed was the armory. As the agents erupted from the trailers, gunfire broke out in several locations throughout the center. The raid agents were ordered to ignore any gunfire, because it was anticipated that it would be necessary to shoot guard dogs in and around the center. In the rear of the center, Whitecliff fired upon the approaching U.S. Army combat helicopters, which had failed to coordinate their raid with the frontal assault units and arrived after the shooting had already begun. During this raid, 4 ATF agents and 3 Davidians were killed; and 22 agents and 4 Davidians were wounded.

Ultimately, the ATF agents retreated and a 51-day siege of the center began. On April 19, agents of the Federal Bureau of Investigation (hereinafter FBI) ordered tanks to enter and tear down the walls of the building and to fire tear gas canisters onto the 84 men, women and children still inside. At around noon, the building caught fire and 75 of the 84 occupants of the center died. A subsequent search of the center by Texas Rangers uncovered hundreds of firearms, whole and fragmented grenades, and other military equipment.

At trial, the government sought to prove that Whitecliff conspired with, and aided and abetted, the co-defendants to murder the ATF agents and used or carried a firearm in the course of the conspiracy to murder. Whitecliff defended these accusations on the basis of sudden passion and self-defense stemming from the ATF attack upon himself and the other Davidians.

The direct testimonial references to Whitecliff, his activities and his statements are scarce, in comparison to the size of the transcript:

ATF agent Rodriguez testified that, on his first meeting with David Koresh on February 17, Whitecliff stared at him. (13 Tr. at 3376-77). Outside the presence of the jury, Rodriguez testified that Whitecliff was in the chapel, on February 27 (the day before the ATF raid), when Koresh discussed a Waco newspaper article written about him and the likelihood that federal agents would come for him. (13 Tr. at 3387-88).

The raid plan called for ATF agents to be transported and disgorged from two cattle trailers at the front door of the Mount Carmel center, while three U.S. Army helicopters, manned by nine (9) ATF agents and assorted National Guard airmen, created a diversion by approaching, at an altitude of 500 feet, from the northeast quadrant of the center. The helicopters failed to coordinate with the frontal, ground assault, which had already erupted into massive gunfire all around the center when the helicopters came into visual range of the center, at about 500 meters from the center. At between 350 and 400 meters from the center, the pilots veered off to the north because of gunfire from the ground. It was later determined that the helicopters were struck, but no one was injured. (12 Tr. at 3154-3214; 13 Tr. at 3225-74, 3274-97). Though ATF weapons were purportedly holstered and the guardsmen unarmed, the helicopters were "combat-equipped aircraft," "used for combat," and painted in Army camouflage. (12 Tr. at 3205). Whitecliff reported to Kathryn Schroeder that, during the February 28 raid, he shot at the helicopters. (17 Tr. at 4515, 4629).

A female survivor of the center, Marjorie Thomas, (25 Tr. at 6190-92), by video deposition, (Government Exhibit Nos. 2213 and 2214), testified about seeing the approaching helicopters while gunfire was erupting around her and a bullet shattered a window near her. (Government Exhibit No. 2213 at 31). She also testified about overhearing a discussion among Whitecliff, co-defendant/appellant Branch and Oliver Gyarfas concerning shooting at unidentified targets. (Government Exhibit No. 2213 at 48-51).

Another female resident of the center, Victorine Wilma Leona Hollingsworth, (16Tr. at 4059-4247), saw Whitecliff, after February 28, keeping watch and sitting next to a gun which was not in his hands. (16 Tr. at 4109-11).

Kathryn Schroeder, (17 Tr. at 4432-4741), a female resident of the center and an original co-defendant, testified that, during the initial cease fire on February 28, she went downstairs to the kitchen. On the way, she was stopped by Whitecliff and asked to bring sodas to "the guys." (17 Tr. at 4468-69). Later, sometime during a twelve-day span after February 28, Schroeder saw Whitecliff, in the church, with an FN-FAL, .308 cal. firearm. (17 Tr. at 4501-04).

Whitecliff did not remain in the center throughout the 51-day siege. He surrendered himself voluntarily and peacefully during the early days. There is no evidence that Whitecliff fired a shot after the February 28 helicopter assault.

ARGUMENTS AMPLIFYING THE REASONS FOR REVIEW

I.

THE FIFTH CIRCUIT HAS MISAPPLIED *MATHEWS v. UNITED STATES*, 485 U.S. 58 (1988), IN ITS HOLDING THAT THE TRIAL COURT DID NOT ERR IN REFUSING AN INSTRUCTION ON SELF-DEFENSE IN THAT THE FIFTH CIRCUIT HAS ALTERED THE STANDARD OF REVIEW TO DISALLOW CONSIDERATION OF THE EVIDENCE RELEVANT TO AN INDIVIDUAL DEFENDANT IN FAVOR OF A CONSIDERATION OF ONLY EVIDENCE RELEVANT TO ALL THE PARTICIPANTS COLLECTIVELY AND TO INCREASE THE BURDEN OF PROOF UPON THE DEFENDANT/MOVANT TO A POINT BEYOND THAT MANDATED BY *MATHEWS v. UNITED STATES*.

This Court has long recognized the general proposition that an accused is entitled to an instruction as to any recognized defense for which there exists "evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). In its opinion, the Fifth Circuit Court of Appeals refused to consider such evidence because the record failed to demonstrate that the movant/defendant had personal knowledge of the evidence, impermissibly weighed and evaluated the credibility of the evidence in support of the defensive instruction, and failed to consider the evidence with regard to the individual appellant. *Branch v. United States*, 91 F.3d at 708-18. This alteration in the standard of appellate review is in conflict with the holding in *Mathews v. United States*.

Simply stated, the standard of appellate review has always been a determination of whether a trial court abused its discretion in refusing an instruction on an affirmative defense, such as self-defense; and an abuse is presumed "where the district court 'refuse[s] a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused innocent,'..." *United States v. Correa-Ventura*, 6 F.3d 1070, 1076 (5th Cir. 1993). In both the majority and dissenting opinions, the panel reviewed the history and distinctions of the various criteria the Fifth Circuit has used in making this determination. Whether defined as evidence "more than a mere scintilla" or "any evidence" or "evidence sufficient," the result is always the same: whether there is substantive evidence to support the submission of a factual issue to the jury. *See United States v. Lucien*, 61 F.3d 366, 374-77 (5th Cir. 1995); and *United States v. Jones*, 839 F.2d 1041, 1053 (5th Cir. 1988). Significantly, it is only the absence of such evidence which warrants a court's determination, that, as a matter of law, the trial evidence fails to raise a factual issue for a jury's determination. *United States v. Stovall*, 953 F.2d 188, 189 (5th Cir. 1992).

In the application of this standard of review to the facts of this case, it is apparent that there is no evidence that Whitecliff was the aggressor, *i.e.*, that he fired the first shot. He was in the rear of the center, away from the assault at the front, and fired only after gunfire had already broken out there. Therefore, he is not precluded, as a matter of law, from asserting self-defense. There is no evidence that he was aware of the approaching ATF agents, and was in no position to either see or hear them at that time. The only evidence is that he was in the rear of the center where he saw only the combat-equipped and camouflaged assault helicopters. There was evidence that shots were being fired from those aircraft.

The only other question is whether there was sufficient evidence to raise a reasonable doubt as to whether the ATF agents used excessive force. And to this extent, Whitecliff will point to the jury determination acquitting him of murder after a self-defense instruction. It is significant also that the trial court, who was in the best position to evaluate such evidence, gave such an instruction as to the murder charge.[2] There is the testimony of two individuals,who were inside the center, that, during the ATF assault, agents fired indiscriminately into windows and walls at points from which there was no gunfire. (17 Tr. at 4432-4741; Government Exhibit No. 2213 at 28-200).

The Fifth Circuit opinion addresses the factual contentions in terms of the "Davidians." Not once in the opinion was Whitecliff accorded consideration of his individual circumstances. It is never noted in this section of the opinion that Whitecliff was not at the front of the center at the time of the assault. However, the knowledge of those Davidians at the front door is attributed to defeat his individual claim to the instruction. Moreover, it imposes upon him the onerous burden of demonstrating, that, under abnormally confused and excited conditions, he was aware of evidence giving rise to the inferences that the ATF agents were shooting indiscriminately into areas from which there had been no fire. *Branch v. United States*, 91 F.3d at 708-18. Such a showing far exceeds the burden of production required for a determination of whether there is substantive evidence to support the submission of the issue of self-defense, based upon excessive force.

---

[2]The issue in the trial court was not whether there was sufficient evidence to support the submission of self-defense on the lesser included offense of voluntary manslaughter, but whether the defendants were entitled to such an instruction at all.

In refusing to afford petitioner the benefit of inferences drawn from the testimony and experiences of others in the compound under the theory that petitioner failed to show that he had access to their knowledge, in refusing to entertain the evidence of a co-defendant as self-serving and incredible, and in failing to evaluate the evidence in support of the self-defense claim in light of petitioner's individual situation, the Fifth Circuit has altered the test established by this Court, and increased the burden of production well beyond the standard set in *Mathews v. United States*. The opinion of the Fifth Circuit conflicts with this Court's decision in *Mathews*. The petition for writ of certiorari should be granted.

II.

THE FIFTH CIRCUIT'S MISINTERPRETATION OF 18 U.S.C. §924(c)(1) AS MERELY A SENTENCING PROVISION, AND ITS REJECTION OF A JURY FINDING ON THE ISSUE OF WHETHER THE FIREARM USED WAS A MACHINEGUN, CONFLICT WITH OPINIONS FROM THE FIRST, SIXTH AND NINTH CIRCUITS.

Petitioner was sentenced to thirty (30) years for carrying a machinegun during a crime of violence under 18 U.S.C. §924(c)(1). The issue is whether the "machinegun" provision of §924(c)(1) constitutes an element of the offense or a sentencing provision. The Fifth Circuit deemed the question a matter of first impression. *Branch v. United States*, 91 F.3d at 738. If this conclusion is correct, the Fifth Circuit determination of the question constitutes a decision on an important question of federal law which has not been, but should be, settled by this Court. Petitioner asserts, however, that the conclusion is not correct and that the holding of the

Fifth Circuit conflicts with decisions in *United States v. Melvin*, 27 F.3d 710 (1st Cir. 1994); *United States v. Sims*, 975 F.2d 1225, 1231 (6th Cir. 1992), *cert. denied*, 507 U.S. 932, 113 S.Ct. 1315, 122 L.Ed.2d 702; *cert. denied*, 507 U.S. 998 and 999, 113 S.Ct. 1617 and 1620, 123 L.Ed.2d 177 and 179 (1993); *United States v. Martinez*, 7 F.3d 146 (9th Cir. 1993); and *United States v. Alerta*, 96 F.3d 1230 (9th Cir. 1996).

The indictment alleged, and the jury found, that petitioner was guilty of using or carrying a firearm in violation of 18 U.S.C. §924(c)(1). (11 R. at 312-20, 15 R. at 1275-78; 32 Tr. at 7403-06). The indictment did not allege, and the jury was not required to make any finding, that the firearm was a machinegun. However, the district court, in its Sentencing Findings and Opinion, (17 R. at 1574-92), ruled that the enhanced-weapon provision of §924(c)(1) is a sentencing provision and not a separate offense. (17 R. at 1574-87). The district court sentenced petitioner to thirty (30) years imprisonment for using a machinegun, (17 R. at 1599-1600,) rather than to the five (5) year sentence applicable to use of a firearm, as found by the jury in its verdict. *Branch v. United States*, 91 F.3d at 738. The Fifth Circuit held that the enhanced-weapon provision is a sentence-enhancement provision, which need not be addressed in the indictment or submitted to the jury in the charge. *Branch v. United States*, 91 F.3d at 738-40.

18 U.S.C. §924(c)(1) provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States,

> uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

It is undisputed that, to convict a person of using or carrying a "firearm" under this provision, the indictment must so allege and the jury must so find. The second and third sentences of the subsection explicitly refer to a "conviction under this subsection" and to a "person convicted of a violation of this subsection," which can only mean that the fact finder has found each element of the offense beyond a reasonable doubt. *See generally Deal v. United States*, 113 S.Ct. 1993, 1996 (1993). Consideration of the subsection, as a whole, leads to the conclusion that the weapon, and its

characteristics, constitute an element of the offense. Therefore, a jury determination is required as to whether the weapon is a short-barreled rifle or shotgun, or a machinegun, or a destructive device, or whether it was equipped with a silencer or muffler.

In *United States v. Sims*, there were four §924(c)(1) counts (one machinegun and three other firearms). *United States v. Sims*, 975 F.2d 1225, 1231 (6th Cir. 1992), *cert. denied*, 507 U.S. 932, 113 S.Ct. 1315, 122 L.Ed.2d 702; *cert. denied*, 507 U.S. 998 and 999, 113 S.Ct. 1617 and 1620, 123 L.Ed.2d 177 and 179 (1993). The issue was whether the double jeopardy clause precludes multiple punishments where there is only a single, drug-related, predicate offense. *United States v. Sims*, 975 F.2d at 1233. The Sixth Circuit held that the double jeopardy clause required that the four counts be consolidated and opined that:

> This may be accomplished prior to trial by consolidating those counts into a single section 924(c) count and submitting special interrogatories or a special verdict form to the jury, requiring that if the jury returns a guilty verdict on the gun charge, it must specify which category or categories of weapons it unanimously has found the defendant was using or carrying. Or, it may be accomplished by submitting the separate gun counts to the jury and, should there be more than one conviction, merging those convictions after trial.

United States v. Sims, 975 F.2d at 1235. The Court ultimately concluded that, if the jury returned a finding as to both a firearm and a machine gun, the firearm finding would be merged into the machinegun finding. *United States v.*

Sims, 975 F.2d at 1235-36. In every respect, the Court determined that a specific jury finding as to the machinegun was required.

Subsequent to the decision in *United States v. Sims*, the Ninth Circuit noted in *United States v. Martinez*, 7 F.3d 146 (9th Cir. 1993):

> Where the defendant is charged for using different types of weapons under section 924(c)(1), the district court should either (1) submit separate counts under section 924(c)(1) to the jury, and, if there is more than one conviction, merge those convictions after trial, or (2) submit one section 924(c)(1) charge to the jury to specify which weapon or weapons the defendant used or carried.

United States v. Martinez, 7 F.3d at 148 n.1. Again, the issue was how to deal with multiple weapons on a single predicate offense and the Ninth Circuit approved the merger of the jury findings. *United States v. Martinez*, 7 F.3d at 147-49. Specifically adopting the *United States v. Sims* rationale, the Ninth Circuit approved the tenet that the type of weapon on a §924(c)(1) conviction is a question to be answered by the jury. *See United States v. Alerta*, 96 F.3d 1230, 1234-35 (9th Cir. 1996).

In *United States v. Melvin*, 27 F.3d 710 (1st Cir. 1994), the jury was not required to make a finding as to which of six firearms, including machineguns and handguns, the jury based its verdict of guilty. *United States v. Melvin*, 27 F.3d at 711. The government argued that there was an implicit finding of a machinegun and the district court found, on a preponderance of the evidence, that the weapon was a machinegun. However, because the jury had made no such finding, the district court imposed only the five (5) year

sentence. *United States v. Melvin*, 27 F.3d at 714. The government appealed on the claim that the record showed the use of a machinegun. *United States v. Melvin*, 27 F.3d at 712. On appeal, the First Circuit noted:

> The government acknowledges that a defendant found guilty of violating §924(c) may be sentenced to a thirty-year term only if the jury specifically identifies a machinegun or silencer as the firearm supporting the conviction.... It also is undisputed that the jury in this case mistakenly was not asked to specify the weapon or weapons underlying its verdict.

United States v. Melvin, 27 F.3d at 714. After reviewing the evidence, the First Circuit concluded "we may not exclude beyond a reasonable doubt the possibility that the jury rendered a guilty verdict ... based on a determination that the defendants possessed only a handgun." Moreover, the Court reasoned, the jury's verdict did not specifically find that defendants used "weapons subject to a term of imprisonment greater than five years." *United States v. Melvin*, 27 F.3d at 715. The First Circuit affirmed the decision of the district court.

With little in the way of elaboration, the majority opinion of the panel in the court below noted the opinion in *United States v. Correa-Ventura*, 6 F.3d 1070 (5th Cir. 1993). In *United States v. Correa-Ventura*, the Fifth Circuit observed that the statute's reliance upon an underlying crime "contributes to the appearance that it is akin to a penalty enhancement provision." *United States v. Correa-Ventura*, 6 F.3d at 1083. Yet, the Court found that the similarity was not dispositive and that §924(c)(1) establishes a separate crime and recognized that "verdict specificity may be

required for some violations of 18 U.S.C. §924(c)." *United States v. Correa-Ventura*, 6 F.3d at 1087. The Court further noted:

> We do note (without deciding) that a different situation may be presented when the evidence tends to prove the use of more than one weapon, and the firearms proven fall within different classes of Section 924(c)'s proscribed weapons. For example, if a firearm violation is asserted, and evidence is introduced as to both shotguns and rifles (with a mandatory 5-year imprisonment penalty) and revolvers with silencing equipment (resulting in a 30-year imprisonment), the jury may well be required to agree on which type of weapon was used in order for the court to assess the appropriate penalty. In that instance, a unanimity instruction as to the class of weapon may be necessary, since the legislature, in amending Section 924(c) to provide varying penalties for certain classified firearms, appears to have indicated its intent that a unanimous verdict be reached with respect to the given class of firearms. *United States v. Sims*, 975 F.2d 1225, 1235-36 (6th Cir. 1992), *cert. denied*, 507 U.S. 932, 113 S.Ct. 1315, 122 L.Ed.2d 702 (1993).

United States v. Correa-Ventura, 6 F.3d at 1087 n.35.

Central to the rationale behind each of these opinions are the observations of this Court in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). That case involved the question of whether the due process clause is violated by a statutory provision mandating a specific sentence if the trial court finds, by a preponderance of the evidence, that an accused possessed a firearm, even though possession of the firearm was, by

statutory proviso, not an element of the criminal offense. *McMillan v. Pennsylvania*, 106 S.Ct. at 2414-16. In holding the Pennsylvania statute constitutional, this Court noted that, were the circumstances different, *i.e.*, had the firearm been critical to the jury deliberations or had the punishment been significantly increased, the due process clause would preclude reducing the state's burden of proof. *McMillan v. Pennsylvania*, 106 S.Ct. at 2416, 2419. More specifically, Justices Marshall and Stevens, in their dissents, were skeptical of any legislative attempt to dilute the burden on matters giving "rise to a special stigma and a special punishment." *McMillan v. Pennsylvania*, 106 S.Ct. at 2420, 2425.

These principles underlie the holding in *United States v. Alerta*, 96 F.3d 1230 (9th Cir. 1996). In that case, the Ninth Circuit reversed an enhanced-weapon conviction, under §924(c)(1), where the jury was not required to make a specific finding of whether the firearm was a pistol or a machinegun. *United States v. Alerta*, 96 F.3d 1234. The Court noted:

> Because of the immense consequences that follow a determination of whether a firearm used in violation of §924(c)(1) is an ordinary firearm or, at the other extreme, a machine gun, we have stated that a jury finding on that issue is required.

United States v. Alerta, 96 F.3d 1234-35. The Ninth Circuit reiterated its adherence to the rationale from *United States v. Martinez*. It also rejected the government's contention that the characteristics of the firearm did not constitute an element of the offense:

> The entire purpose of our requiring a special verdict or separate charges in *Martinez* was that the jury find

> beyond a reasonable doubt that the defendant used a machine gun. If the 30-year consecutive sentence is to be imposed under section 924(c)(1), the fully automatic character of the firearm must be found by the jury; that is to say, it is an element of the crime.

United States v. Alerta, 96 F.3d 1235. Again, the underlying rationale is in complete accord with the observations this Court made in *McMillan v. Pennsylvania*:

> Thus, for all we know, Alerta may have been sentenced to 30 years without a finding by the jury that he used or carried a machine gun. That we cannot permit, despite the very strong evidence that Alerta used or carried a machinegun. "[T]he question is not whether guilt may be spelt out in the record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials."

United States v. Alerta, 96 F.3d at 1236 [quoting *Carella v. California*, 491 U.S. 263 (1989) (Scalia, J., concurring)].

The gravamen of a §924(c)(1) offense is using or carrying a firearm. Unlike the situation in *McMillan v. Pennsylvania*, the weapon is an essential element of the offense. Its existence and characteristics are critical to the government's case. Petitioner can image no situation in which the government, in its case-in-chief, would not show that the firearm was a short-barreled rifle or shotgun, a machinegun, or that it constituted a destructive device or was equipped with a silencer or muffler. The statute provides also for a significant increase of twenty-five (25) years, if the firearm is a machinegun. The very fact that a machine gun, by definition, is a firearm makes the fact that the weapon is a machinegun a fact necessary to constitute the offense.

Therefore, the question whether the weapon was a machinegun is an essential element of the crime and subject to a jury determination on proof beyond a reasonable doubt. It is not merely a sentencing factor.

The conflicts between the Fifth Circuit opinion in this case and the opinions of the First, Sixth and Ninth Circuit opinions are apparent. The petition for writ of certiorari should be granted.

III.

THE FIFTH CIRCUIT HAS MISCONSTRUED 18 U.S.C. §924(c)(1) TO ELIMINATE ANY REQUIREMENT OF A CONVICTION PRECEDENT TO THE ASSESSMENT OF ITS ENHANCED-PUNISHMENT PROVISION, IN CLEAR ABROGATION OF THE PLAIN WORDS AND MEANING OF THE STATUTE.

In Count 1 of the indictment, Whitecliff was charged with the offense of conspiracy to commit the murder of federal agents. (11 R. at 312-19). In Count 3 of the indictment, Whitecliff was charged with using or carrying a firearm in the commission of the offense alleged in Count 1. (11 R. at 320). The jury returned a verdict of not guilty to Count 1 and a verdict of guilty to Count 3. (15 R. at 1275, 1278; 32 Tr. at 7403, 7405). On the appellate challenge to the absence of a conviction on the predicate offense, the Fifth Circuit held that none was required. *Branch v. United States*, 91 F.3d at 732-33. This holding constitutes a decision on an important question of federal law which has not been, but should be, decided by this Court.

18 U.S.C. §924(c)(1) provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

The issue before the Court is whether §924(c)(1), by its plain and concise wording, mandates a conviction on the

predicate offense. Petitioner is not contending that he is entitled to an acquittal based upon the inconsistent jury verdict on the predicate offense alleged in Count 1 of the indictment. *United States v. Powell*, 469 U.S. 57 (1984).

18 U.S.C. §924(c)(1) criminalizes the use or carrying of a firearm "during and in relation to any crime of violence." It further provides that any sentence under the subsection is "in addition to the punishment provided for such crime of violence." Clearly, no punishment can be assessed for the predicate crime in the absence of a conviction. Moreover, the second sentence of the subsection mandates that any sentence be consecutive to all other sentences assessed, "including that imposed for the crime of violence." By its clear and concise wording, §924(c)(1) contemplates that there be a conviction on the predicate crime. Requiring that the firearm sentence begin only upon completion of the sentence for the predicate offense is consistent only with the intent that a conviction of the predicate crime be secured before a firearm conviction is warranted under §924(c)(1).

When Congress amended §924(c), under the Comprehensive Crime Control Act of 1984, it added the consecutive sentencing language to insure that there could be no concurrent sentencing with the predicate, or underlying, offense. S. Rep. No. 98-225, 98th Cong., 2d Sess. 312. The clear intent of the legislature was that there be a sentence on the predicate offense.

In the Fifth Circuit opinion, the challenge raised here was answered by citation to *United States v. Munoz-Fabela*, 896 F.2d 908 (5th Cir.), *cert. denied* 498 U.S. 824 (1990); and *United States v. Ruiz*, 986 F.2d 905 (5th Cir.), *cert. denied* 114 S.Ct. 154 (1993). Both are predicated upon the rationale that §924(c)(1) is a wholly separate offense and provides an independent basis for prosecution from the

predicate offense. Neither case, or any other found by petitioner, addresses the issue of whether a conviction on the predicate offense is mandated by the language of the statute itself.

Assuming, without conceding, that §924(c)(1) is nebulous with regard to the necessity of a conviction on the underlying, or predicate, offense, petitioner asserts that the rule of lenity will produce the same result. In the orderly review of statutory intent, the court looks first to the statutory text, legislative intent, and the policy considerations intrinsic to its enactment. *Moskal v. United States*, 111 S.Ct. 461, 465 (1990). If, at the conclusion of such a review, the court determines that the statute is subject to dual interpretations, the rule of lenity is invoked. That rule provides that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 92 S.Ct. 515, 523 (1971). If the rule of lenity is applied, §924(c)(1) would require a conviction on the predicate offense as a precondition to a successful prosecution of the firearm offense.

The text and legislative history of §924(c)(1) clearly indicate that Congress intended that an accused be convicted of the predicate offense as an element of the conviction for using or carrying a firearm during or in relation to that offense. The Fifth Circuit's rejection of the clear import of the statute constitutes a decision on an important question of federal law which has not been, but should be, settled by this Court. The petition for writ of certiorari should be granted.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

STEVEN R. ROSEN
440 Louisiana, Suite 2100
Houston TX 77002
Phone (713) 227-2900
Fax (713) 227-2922
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50437

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
BRAD EUGENE BRANCH, ET AL.,
Defendant-Appellant.

Appeal from the United States
District Court for the
Western District of Texas

(Opinion *United States v. Branch*, 5 Cir., 1996, 91 F.3d 699)

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and SCHWARZER*, District Judge.

PER CURIAM:

---

* District Judge of the Northern District of California, sitting by designation.

We find that *United States v. Lucien*, 61 F.3d 366 (5th Cir. 1995), does not control in this case. *Lucien* presented a factually different situation where instructional error in a predicate offense infected the conviction under 18 U.S.C. § 924(c)(1). The jury charge in *Lucien* failed to allow the jury to consider the lesser offense of possession, resulting in reversal of the predicate court. If in *Lucien* the found predicate offense had been possession of drugs as distinguished from distribution, the jury's view of the use of firearms found on the premises might have been quite different. Moreover, in *Lucien*, the government did not contest the reversal of the § 924(c)(1) conviction on the grounds that inconsistent verdicts may stand and therefore effectively conceded that point. We decline to interpret *Lucien* as changing the universally held view that inconsistent verdicts may stand. *United States v. Powell*, 469 U.S. 57 (1984). The remaining contentions are also without merit and are rejected. Judge Schwarzer adheres to his dissent.

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this court having requested that the court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

APPENDIX B

AO 245 S (Rev. 4/92)(W.D.Tx.rev.) Sheet 1 - Judgment in a Criminal Case

---

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

KEVIN A. WHITECLIFF,
Defendant.

AMENDED
Case Number
W-93-CR-046(3)

USAO Number
9301274

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, KEVIN A. WHITECLIFF, was represented by STEVEN ROCKET ROSEN.

The defendant has been found not guilty on Court SSS1 and is discharged as to such count.

The defendant was found guilty on Counts SSS2 and SSS3 by a jury verdict on February 26, 1994, after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title & Section	Nature of Offense
18:1112(a) and 18:2	Aiding and Abetting the Voluntary Manslaughter of Federal Officers

Date of Offense	Count Number(s)
02/28/93	SSS2
Title & Section	**Nature of Offense**
18:924(c)(1)	Possession of a Firearm During the Commission of a Crime of Violence
Date of Offense	**Count Number(s)**
02/28/93	SSS3

As pronounced on June 17, 1994, the defendant is sentenced as provided in Pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 for Counts SSS2 and SSS3, which shall be due immediately. Said Special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 23rd day of June, 1994.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

Defendant's SSAN: 576-88-3930
Defendant's Date of Birth: 06/23/61
Defendant's address: 728 Palani Avenue
Honolulu, HI 96816

A true copy of the original, I certify,
WILLIAM G. PUTNICKI
Clerk, U.S. District Court
By: Mary Cunningham
Deputy

AO 245 S(Rev.4/92(W.D.TX.rev) Sheet 2 - Imprisonment

Defendant: KEVIN A. WHITECLIFF
Case Number: W-93-CR-046(3)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED TWENTY (120) MONTHS as to Count SSS2 and THIRTY (30) YEARS as to Count SSS3, the term imposed as to Court SSS3 to be served CONSECUTIVELY to the term imposed as to Court SSS2.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

AO 245 S(Rev. 10/90)(W.D.TX.rev.) Sheet 3- Supervised Release

Defendant: KEVIN A. WHITECLIFF
Case Number: W-93-CR-046(3)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS as to Court SSS2 and FIVE (5) YEARS as to Court SSS3, such terms of supervised release to be served CONCURRENTLY with each other.

While on supervised release, the defendant shall not commit another Federal, State, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this Court (set forth below); and shall comply with the following additional conditions:

X If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

X If this judgment imposes a fine, special assessment, costs, or restitution obligation, the defendant shall pay any such fine, assessments, costs and restitution that remain unpaid at the commencement of the term of supervised release.

_X_ The defendant shall not own or possess a firearm or destructive device.

_X_ The defendant shall provide the probation officer with access to any requested financial information.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the Court or probation officer.

2) The defendant shall report to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) The defendant shall not use or possess methadone for treatment purposes, or in any other manner, shape or form, without express authority of the Court.

AO 245 S (Rev. 4/91)(W.D.Tx.rev) Sheet 5 - Fine

FINE

The defendant shall pay a fine of $2,000.00. This fine includes any costs of incarceration and supervision.

This amount is the total of the fines imposed on individual counts, as follows: $1,000.00 as to Count SSS2 and $1,000.00 as to Court SSS3.

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

This fine shall be paid immediately. Any fine assessment and/or restitution that remain unpaid shall be paid during the term of supervised release at the direction of the United States Probation Officer.

If the fine is not paid, the Court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

AO 245 S (Rev. 4/91)(W.D.Tx rev.) Sheet 6 - Restitution and Forfeiture

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Alcohol, Tobacco, and Firearms Attn: David Effley, Ray Shirley, and Jane McHam 525 Griffin Street, Room 100 Dallas, TX 75202	$ 637,607.49
United States Department of Justice Office of Justice Programs Re: Public Safety Officers Benefit Program 633 Indian Avenue Northwest Washington, DC 20531	$ 494,080.00

Correspondence to the Department of Justice should reference the following case numbers:

PSOB, Case Number 93-101 - Conway Charles LeBleu,
PSOB, Case Number 93-102 - Robert J. Williams,
PSOB, Case Number 93-103 - Todd W. McKeehan, and
PSOB, Case Number 93-104 - Steven D. Willis.

Payments of restitution are to be made to the United States Attorney for transfer to the payees.

Restitution shall be paid in full immediately.

Any payment shall be divided proportionately between the payees.

AO 245 S.(Rev. 4/91)(W.D.Tx.rev.) Sheet 7 - Statement of Reasons

Defendant: KEVIN A. WHITECLIFF
Case Number: W-93-CR-046(3)

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report except the Court determined the defendant's actions constituted obstruction of justice, and two points were added to the offense level.

Guideline Range Determined by the Court:

Total Offense Lever:	30
Criminal History Category:	1
Imprisonment Range:	97 months to 120 months
Supervised Release Range:	2 to 3 years
Fine Range:	$15,000.00 to $150,000.00
Restitution:	$1,131,687.49

The fine is below the guideline range because of the defendant's inability to pay and amount of restitution.

The sentence is within the guideline range, that range does not exceed 25 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.